

2017

# Restoring Pre-Existing Compliance through the FCPA Pilot Program

Andrew B. Spalding

*University of Richmond*, [aspaldin@richmond.edu](mailto:aspaldin@richmond.edu)Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>Part of the [Business Organizations Law Commons](#), and the [International Trade Law Commons](#)

## Recommended Citation

Andrew Spalding, Symposium, *Restoring Pre-Existing Compliance through the FCPA Pilot Program*, 48 U. Tol. L. Rev. 519 (2017).

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

# RESTORING PRE-EXISTING COMPLIANCE THROUGH THE FCPA PILOT PROGRAM

*Andrew Spalding\**

## ABSTRACT

FOR a quarter-century, incentives to invest in corporate compliance programs have been a cornerstone of federal white-collar enforcement. But the U.S. Department of Justice's most recent announcement of anti-bribery enforcement policy—the FCPA Pilot Program—takes a peculiar and possibly inadvertent turn. In providing newly transparent and explicit penalty reductions, and rolling out the Department's declination policy, the program neglects to incentivize investments in pre-existing compliance. Though remedial, or post-violation, compliance receives a newly heightened importance, pre-existing compliance receives virtually no attention. This is strange, but should not be understood as a new policy change on the benefits of pre-existing compliance; no conceptual basis for devaluing preventative compliance programs exists. Rather, it is likely an oversight, innocent in origin but far from innocuous in application. Now is the time to address it.

This article argues that pre-existing compliance should be restored to its rightful place at the center of FCPA enforcement policy. It describes the rise of federal incentivizes to invest in pre-existing compliance, beginning with the U.S. Sentencing Guidelines and continuing through Delaware corporate law, Sarbanes-Oxley, a series of Deputy Attorney General memoranda, the U.S. Attorneys' Manual, the *FCPA Guidance*, and recent FCPA enforcement actions. It then describes the FCPA Pilot Program and how pre-existing compliance somehow, inexplicably, drifted out of its traditionally central role in enforcement policy. The article concludes with suggesting a number of ways to think about how the Pilot Program's current policies can be preserved and honored, while restoring pre-existing compliance to the place that most all stakeholders to FCPA enforcement—companies, compliance professionals, FCPA lawyers, and even the enforcement authorities themselves—believe it should hold.

---

\* Professor of Law, University of Richmond School of Law, and Senior Editor of *The FCPA Blog*. Many thanks to the Toledo Law Review for sponsoring an excellent symposium and for their editing miracles on this article.

## INTRODUCTION

For a quarter century, the U.S. Department of Justice (“DOJ”) has offered incentives to corporations to invest in compliance programs.<sup>1</sup> These programs help deter violations of federal law while imposing minimal burdens on the public fisc; in this regard they are a highly cost-effective tool in the federal enforcement arsenal.<sup>2</sup> Charging and sentencing policy have thus been tethered to the dual moors of pre-existing compliance (compliance improvements made prior to a known violation, with the intent to prevent violations in the first place) and remedial compliance (compliance enhancements made after the government investigates a violation and as a term of the eventual settlement to prevent repeat violations). Incentives to invest in both pre-existing and remedial compliance are strewn throughout the U.S. Sentencing Guidelines, DOJ memoranda, the U.S. Attorneys’ Manual, informal DOJ guidance, and settlement documents.<sup>3</sup>

But in international anti-bribery law specifically, the recent DOJ policy has begun to drift from arguably the bigger and more reliable of these moors.<sup>4</sup> Seemingly inadvertently, as if by omission and not design, pre-existing compliance has suddenly dropped out of the conversation. The DOJ’s experimental “Pilot Program,”<sup>5</sup> announced in April 2016 and continuing into 2017, provides a series of specified rewards for voluntary disclosure, cooperation, and remediation.<sup>6</sup> In so doing, the Pilot Program advances the historical practice of rewarding remedial compliance. But quite strangely, the program makes virtually no mention of pre-existing compliance.<sup>7</sup> So too does each of the five settlements thus far formally announced under the Pilot Program award a declination without any mention of the defendant’s pre-existing compliance.<sup>8</sup> Although evaluating the defendants’ pre-existing compliance may have been part of the private negotiations, they are playing no part in the public announcements.<sup>9</sup> This is ironic, given the historical centrality of pre-existing compliance to enforcement policy, not to mention the Pilot Program’s stated goal

---

1. Compliance may be defined as “the processes by which an organization seeks to ensure that employees and other constituents conform to applicable norms—which can include either the requirements of laws or regulations or the internal rules of the organization.” GEOFFREY P. MILLER, *THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE* 3 (2014).

2. *Id.*

3. See Andrew Brady Spalding, *On Maximizing Deterrence Per Dollar*, 67 FLA. L. REV. F. 233, 236 (2016).

4. See generally ANDREW WEISSMANN, CRIM. DIV., U.S. DEP’T OF JUSTICE, *THE FRAUD SECTION’S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE* (2016), <https://www.justice.gov/criminal-fraud/file/838416/download> [hereinafter “FCPA Pilot Enforcement Plan”].

5. *Id.* at 2-4, 7-9.

6. *Id.* at 3, 8-9.

7. See *infra* Part II.

8. See *infra* Part II.

9. See FCPA Pilot Enforcement Plan, *supra* note 4, at 4-8.

of “encourag[ing] companies to implement strong anti-corruption compliance programs.”<sup>10</sup>

This article argues that the DOJ simply must restore pre-existing compliance to the prominent place it has always held in enforcement policy. To the extent we still believe that incentivizing investments in pre-existing compliance is good policy—and there is absolutely no indication that we do not—pre-existing compliance should return to the center of enforcement policy. Accordingly, this article explores why and how we might bring pre-existing compliance back. It begins with an analysis of why pre-existing compliance is critical to federal enforcement policy, showing its centrality to federal policy statements over the last 25 years. It then describes the seemingly inadvertent omission of pre-existing compliance from the Pilot Program announcement. It ends by proposing several ways of bringing pre-existing compliance back to the forefront of enforcement policy, in the hopes of contributing to the policy debate that should now occur.

## I. THE RISE OF PRE-EXISTING COMPLIANCE<sup>11</sup>

To appreciate the peculiar abeyance of pre-existing compliance in contemporary sentencing policy, one needs to understand why pre-existing compliance is important and how it has figured in sentencing policy up to this point. This section does each, in turn.

### A. *Why Incentivize Pre-Existing Compliance?*

The principal goal of federal white-collar enforcement is general deterrence: reducing violations by putting prospective violators on notice that should they be caught, they too will be punished.<sup>12</sup> General deterrence has thus been called the “holy grail” of criminal enforcement.<sup>13</sup> Because an enforcement agency begins with a limited budget, its goal is to get maximal deterrence within those limits. Put another way, it wants the greatest deterrence “bang for the buck.”<sup>14</sup> This “bang” might be best expressed as a ratio: deterrence per dollar (“DPD”).<sup>15</sup> An enforcement agency seeks to maximize this ratio, getting as much deterrence as possible for the dollars it has available.<sup>16</sup>

Efforts to increase deterrence can then be understood as tinkering with either half of this ratio. The government may seek to increase the numerator,

---

10. *Id.* at 2.

11. Portions of this section were previously published by the author. See Spalding, *supra* note 3.

12. *Id.* at 235.

13. Patrick J. Keenan, *The New Deterrence: Crime and Policy in the Age of Globalization*, 91 IOWA L. REV. 505, 515 (2006).

14. See Spalding, *supra* note 3, at 234.

15. *Id.*

16. *Id.*

while keeping the denominator constant.<sup>17</sup> That is, it might find ways to improve general deterrence without increasing its budget, rendering enforcement more efficient.<sup>18</sup> Or, it may on occasion find its denominator increased, in which case it has an increased budget.<sup>19</sup> With an increased denominator comes an expectation that the additional enforcement efforts this money will buy will at the very least keep the ratio constant.<sup>20</sup> Each of these—increasing deterrence on a fixed budget, or increasing the budget—will happen from time to time in an enforcement agency's history. But irrespective of the denominator (the budget's size), the government seeks to maximize DPD.<sup>21</sup>

In Foreign Corrupt Practices Act ("FCPA") enforcement, the DOJ is now doing both. On the denominator side, the DOJ is increasing enforcement resources.<sup>22</sup> In April of 2016, the DOJ announced that ten new prosecutors were added to the Fraud Section's FCPA Unit, an increase of more than 50%.<sup>23</sup> So too did the FBI create "three new teams of special agents dedicated to FCPA investigations and prosecutions."<sup>24</sup> The DOJ has increased its resources in an additional way. In November 2015, the DOJ Fraud Section hired a full-time compliance expert, Hui Chen.<sup>25</sup> The DOJ's expressed purpose in retaining Chen is to provide "expert guidance" to prosecutors as they evaluate the compliance programs that were in place at the time the misconduct occurred.<sup>26</sup> Chen will help the DOJ develop benchmarks for compliance programs and, to this end, communicate with stakeholders.<sup>27</sup> Similarly, when the resolution of a case includes requiring enhanced compliance measures, Chen will be involved in evaluating those measures.<sup>28</sup> This is one critically important part to increasing the effectiveness of anti-bribery enforcement.

Another is to increase the numerator—to develop increasingly efficient ways of spending public resources. The DOJ is also making important strides in this area. The first step towards increased efficiency occurred in September 2015 when the Deputy Attorney General released a memo, now known as the "Yates Memo," announcing a new focus on individual liability for corporate wrongdoing.<sup>29</sup> With a declared intention to "fully leverage its resources," or in

---

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. FCPA Pilot Enforcement Plan, *supra* note 4, at 1-2.

23. *Id.* at 1.

24. *Id.*

25. See Press Release, U.S. Dep't of Justice, New Compliance Counsel Expert Retained by the Dep't of Justice Fraud Section (Nov. 3, 2015), <https://www.justice.gov/criminal-fraud/file/790236/download>.

26. *See id.*

27. *Id.*

28. *Id.*

29. Memorandum from Sally Q. Yates, Deputy Attorney General, on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download> [hereinafter "Yates Memo"].

other words, maximize DPD, the DOJ announced six changes to policy, each of which was incorporated into the U.S. Attorneys' Manual.<sup>30</sup> First, a company will not receive cooperation credit unless it provides to the DOJ "all relevant facts relating to the individuals responsible for the misconduct."<sup>31</sup> "[T]he company must identify all individuals ... regardless of their position" in the company and provide all relevant information<sup>32</sup> Second, both "criminal and civil corporate investigations should focus on individuals from the ... [start] of the investigation."<sup>33</sup> Third, the attorneys handling the civil and criminal investigations should communicate with each other regularly.<sup>34</sup> In the FCPA context, this would typically mean the DOJ and SEC attorneys. Fourth, corporate resolutions—meaning deferred prosecution and non-prosecution agreements—will not provide protection from liability for individuals within the company.<sup>35</sup> Fifth, the corporate resolutions should not occur "without a clear plan to resolve ... individual cases before the statute of limitations expires."<sup>36</sup> Finally, civil lawyers should decide whether to prosecute individuals based on factors other than an ability to pay a penalty.<sup>37</sup>

Similarly, the DOJ has announced a new focus on international cooperation.<sup>38</sup> The Department "has increasingly been working collaboratively to combat bribery schemes that cross national borders" by sharing leads, documents, and witnesses with foreign enforcement authorities.<sup>39</sup>

A third way the Department has sought to increase its deterrence "bang for the buck," is the FCPA Pilot Program, discussed below.<sup>40</sup>

But there is an additional, and perhaps less appreciated, instrument in the government's arsenal for increasing deterrence: incentivizing the adoption of compliance programs.<sup>41</sup> Compliance might be understood as a kind of preemptive deterrence.<sup>42</sup> That is, rather than waiting until a defendant violates the law, and using that case to fire a shot across industry's bow, federal law can induce companies to invest in programs that will help to reduce violations in the first place.<sup>43</sup> In this sense, it achieves general deterrence without reliance on specific deterrence. It is truly preventative.

Compliance as a matter of practice has erupted in the last two decades or so, leading Professor Sean Griffith to announce that "American corporations have

---

30. *Id.* at 2-6.

31. *Id.* at 3-4.

32. *Id.* at 3.

33. *Id.* at 3-4.

34. *Id.*

35. *Id.* at 3, 5.

36. *Id.*

37. *Id.* at 3, 5-6.

38. FCPA Pilot Enforcement Plan, *supra* note 4, at 2.

39. *Id.*

40. *See infra* Part II.

41. *See* Spalding, *supra* note 3, at 235.

42. *See, e.g.,* Jennifer Arlen, *Removing Prosecutors from the Boardroom*, in *PROSECUTORS IN THE BOARDROOM* 62, 70-71 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

43. *See* Spalding, *supra* note 3, at 235.

witnessed the dawn of a new era: the era of compliance.”<sup>44</sup> Griffith explains that “[c]ompliance does not fit traditional ... [forms] of corporate governance [in that] [i]t does not come from the board of directors, state corporate law, or federal securities law, [but is] instead ... an internal governance structure imposed upon the firm from the outside by enforcement agents.”<sup>45</sup> It thus upends the idea that “governance arrangements ... [should] be the product of a bargain between shareholders and managers,” substituting instead the will of a government enforcer, and reinvigorating older debates about the fundamental purposes of the firm.<sup>46</sup> The Government thus gets inside the firm, getting the company to do the government’s work without taxing the public. The company detects its own violations, conducts its own investigation, and (hopefully) addresses the problem of its own accord.<sup>47</sup> To the extent that reporting and cooperation are part of compliance, this is an even more dramatic example.<sup>48</sup> But there can be little question that outsourcing enforcement to the firm through compliance programs is highly cost-effective to the public (though it may not be to the company).<sup>49</sup>

Appreciating these benefits, U.S. white-collar enforcement has historically made pre-existing compliance a cornerstone of enforcement policy, as the next subsection describes.

*B. The Historical Centrality of Pre-Existing Compliance in Enforcement Policy*

As described above, compliance exists (for sentencing policy purposes) in two forms: preventative and remedial.<sup>50</sup> Federal law and policy have rewarded either or both, and have again done so at two phases of enforcement: the charging phase, where the enforcement agency determines whether and how to charge the company, and, if liability is to attach to the defendant’s conduct, the penalty phase.

As this subsection will show, both forms of compliance are manifest throughout the constellation of formal and informal statements of law and policy that shape enforcement today. This subsection pieces together the history of federal incentives to invest in pre-existing compliance by examining the U.S. Sentencing Guidelines, Delaware corporate law, federal statutes governing business conduct, memoranda written by Deputy Attorneys General, the U.S. Attorneys’ Manual, the DOJ’s and SEC’s FCPA Guidance, and the settlement documents of contemporary FCPA enforcement actions. Examining these sources shows not only that both pre-existing and remedial compliance have been

---

44. Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2077 (2016).

45. *Id.* at 2075.

46. *Id.* at 2079.

47. *Id.* at 2082.

48. See Spalding, *supra* note 3, at 233-35, 238, 240.

49. *Id.* at 234.

50. *Id.* at 233, 234-36.

thought essential to sentencing, but that the former—pre-existing compliance—has historically occupied the larger place.

### 1. *The U.S. Sentencing Guidelines*

We might begin the story of incentivizing compliance in the 1980s, when the Sentencing Guidelines did not yet exist.<sup>51</sup> As the U.S. Supreme Court has observed, “the broad discretion of sentencing courts” had produced “significant sentencing disparities among similarly situated offenders.”<sup>52</sup> Congress thus created the U.S. Sentencing Commission in 1984, and then in 1987 passed the Sentencing Reform Act,<sup>53</sup> which directed the Commission to promulgate federal sentencing guidelines.<sup>54</sup> Though the U.S. Supreme Court would hold in 2005 that the Guidelines are merely advisory,<sup>55</sup> they nonetheless figure prominently in the calculation of FCPA sentences today.<sup>56</sup>

The Sentencing Guidelines today provide that a corporate fine depends “on the seriousness of the offense and the culpability of the organization.”<sup>57</sup> “Culpability generally will be determined by six factors.”<sup>58</sup> The four that will increase the organization’s punishment “are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice.”<sup>59</sup>

But two factors will mitigate punishment, and here lies the first appearance of pre-existing compliance.<sup>60</sup> Those factors are “self-reporting, cooperation, or acceptance of responsibility,” and “the existence of an effective compliance and ethics program.”<sup>61</sup> The mitigating factors thus have two dimensions: how the

---

51. See U.S. SENTENCING COMM’N, *FEDERAL SENTENCING: THE BASICS 1* (2015), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510\\_fed-sentencing-basics.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf).

52. *Peugh v. United States*, 133 S. Ct. 2072, 2079 (2013).

53. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

54. See *FEDERAL SENTENCING: THE BASICS*, *supra* note 51, at 1.

55. *United States v. Booker*, 543 U.S. 220, 227, 245-46 (2005).

56. See U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (U.S. SENTENCING COMM’N 2016), <http://www.ussc.gov/guidelines/2016-guidelines-manual> (select “Download the complete Manual” hyperlink for PDF version).

57. *Id.* ch. 8 introductory cmt.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* Draft Guidelines “focused on four components: policies and procedures, communication, monitoring, and enforcement.” Griffith, *supra* note 44, at 2085 (citing NOLAN E. CLARK, *COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES* § 2.23 (Pre-Publication Staff Working Group Draft 2016)). The Sentencing Guidelines were amended twice in ways relevant to compliance. In 2004, revisions “require[d] a ‘culture’ of ethics and a risk assessment (or ‘best practice gaps’ analysis)” as part of an adequate compliance program, and require “internal controls to promote compliance” as well as setting up incentives and disciplinary measures. CAROLE BASRI, *CORPORATE COMPLIANCE* 27 (2017). In 2010, the Guidelines were again amended to establish four criteria for “receiv[ing] a deduction in the culpability score,” the first of which is that compliance officers are obligated to report directly “to the governing authority.” *Id.* The remaining three criteria are: “(2) the compliance program detected the offense before outside



organization responded in the wake of the violation, and what good-faith preventative measures were in place at the time of the violation—namely, compliance. Note that remedial compliance is not explicitly mentioned, though it might be implicit in the acceptance of responsibility.

It is noteworthy that compliance first appears as pre-existing compliance; remedial compliance is present only by implication. The Guidelines explain that they:

offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws.<sup>62</sup>

But for the obvious reason that general deterrence includes preventing recidivism, the Guidelines address remedial compliance in Part B, “Remedying Harm from Criminal Conduct, and Effective Compliance and Ethics Program.”<sup>63</sup> Still, it does so by sounding both preventative and remedial themes. The Guidelines explain that “[t]he failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.”<sup>64</sup> In assessing compliance programs, the Guidelines provide seven criteria.<sup>65</sup> The seventh is “After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization’s compliance and ethics program.”<sup>66</sup>

Finally, in Part C, the Guidelines calculate the fines. In determining the range, a penalty reduction of three points is available when the organization “had

---

discovery”; (3) the corporation promptly self-reported; and “(4) no compliance officer participated in, condoned, or was willfully ignorant of the offense.” *Id.*

62. GUIDELINES MANUAL, *supra* note 56, ch. 8 introductory cmt.

63. *Id.* § 8B1.

64. *Id.* § 8B2.1(a).

65. *Id.* § 8B2.1(b)(1)–(7). The exercise of due diligence in the prevention and detection of criminal conduct, and an organizational culture that encourages ethical conduct; the exclusion from “substantial authority” of personnel known to have engaged in illegal or unethical conduct; the regular communication of standards and procedures, and regular training; regular monitoring and auditing of the compliance program, and a protected whistleblower mechanism; the use of incentives and disciplinary measures to promote the effective implementation of the program; and the rapid and effective response to detected misconduct, including making any necessary changes to the compliance program. *Id.*

66. *Id.* § 8B2.1(b)(7). Commentary further provides, “[T]he organization should act appropriately to prevent further similar criminal conduct, including assessing the compliance and ethics program and making modifications necessary to ensure the program is effective.” *Id.* § 8B2.1 cmt. n.6.

in place at the time of the offense an effective compliance and ethics program.”<sup>67</sup> In determining the fine within the sentencing range, judges should consider eleven factors, including “whether the organization failed to have, at the time of the instant offense, an effective compliance and ethics program.”<sup>68</sup>

Just as one would expect, the Sentencing Guidelines give treatment to both preventative and remedial compliance. But if it can be fairly said that one receives more attention than the other, pre-existing compliance would come out on top. And this should not surprise us, for reasons to be explored below.

## 2. *Delaware Corporate Law*

Five years after promulgation of the Sentencing Guidelines, the second important installment would come in the form of Delaware corporate law.<sup>69</sup>

In *In re Caremark International Derivative Litigation*,<sup>70</sup> shareholders brought a derivative suit alleging that the board breached its fiduciary duty of care by failing to exercise sufficient oversight related to employee violations of certain health care regulations. The Board submitted a settlement proposal in which it agreed to more rigorous monitoring to prevent similar violations.<sup>71</sup> While finding a “very low probability” that a breach of the duty of care had occurred, the court cited the Sentencing Guidelines adopted eight years earlier and noted the increasing use of federal criminal law to assure corporate compliance with environmental, financial, employee and product safety, and other health and safety regulations.<sup>72</sup> The court observed that the relatively new Guidelines imposed substantially heavier penalties on corporations, while at the same time providing substantial incentives, in the form of reduced penalties, to invest in compliance programs.<sup>73</sup> The court found that “[a]ny rational person

---

67. *Id.* § 8B2.1 cmt. n.6. “If the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program, as provided in § 8B2.1 (Effective Compliance and Ethics Program), subtract 3 points.” *Id.* § 8C2.5(f)(1). Similarly, there is a rebuttable presumption that the organization’s compliance and ethics program was not effective if an individual who is either “high-level personnel” within a small organization, or has “substantial authority” within any organization, “participated in, condoned, or was willfully ignorant of, the offense.” *Id.* § 8C2.5(f)(3)(B)(i)-(ii). But that provision should not apply where “the individual or individuals with operational responsibility for the compliance and ethics program have direct reporting obligations to the governing authority or an appropriate subgroup,” “the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely,” or “no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.” *Id.* § 8C2.5(f)(3)(C)(i)-(iv) (internal citations omitted). So too may upward departures be warranted where the compliance ethics program was installed in response to a court order or administrative order or was required by law to have an effective program but did not. *Id.* § 8C4.10. So too may companies be put on probation if they were required under law to have an effective program in place but did not. *Id.* § 8D1.1(a)(3).

68. *Id.* § 8C2.8(a)(11).

69. See *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

70. *Id.*

71. *Id.* at 972.

72. *Id.* at 961.

73. *Id.* at 969.

attempting in good faith to meet an organizational governance responsibility would be bound to take into account [the Sentencing Guidelines] and the enhanced penalties and the opportunities for reduced sanctions that it offers.”<sup>74</sup>

Accordingly, the court explained that corporate boards cannot satisfy their obligation to stay reasonably informed concerning the corporation without making sure that “information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board ... to reach informed judgments concerning both the corporation’s compliance with law and its business performance.”<sup>75</sup> Accordingly, the court held:

[A] director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.<sup>76</sup>

Though finding no breach had occurred, the case nonetheless provides the foundation for the compliance standards that will shortly work their way into the memoranda of Deputy Attorneys General and ultimately the U.S. Attorneys’ Manual.<sup>77</sup> These standards plainly concern pre-existing, rather than remedial, compliance.

### 3. *Deputy U.S. Attorney General Memoranda and the U.S. Attorneys’ Manual*

The U.S. Department of Justice would rely on both the Guidelines and *Caremark* in drafting a series of widely read memoranda on enforcement policy.<sup>78</sup> In five memos, written over ten years by successive Deputy Attorneys General, the Department would describe the factors federal prosecutors should consider when deciding whether to charge a company.<sup>79</sup> The memos are perhaps best known today for their controversial and evolving position on the issue of waiving attorney-client privilege.<sup>80</sup> But the memos also address the role of

---

74. *Id.* at 970.

75. *Id.*

76. *Id.* The Delaware Chancery Court would affirm the *Caremark* holding, and clarified in *Stone v. Ritter*, 911 A.2d 362 (Del. 2006) (finding that a breach of the monitoring duty occurs when the board either “utterly failed to implement any reporting or information system or controls” or if “having implemented such system or controls, consciously fails to monitor oversee its operations”).

77. *See, e.g.*, Memorandum from Eric Holder, Deputy Attorney Gen., on Bringing Criminal Charges Against Corporations (June 16, 1999), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> [hereinafter “Holder Memo”] (incorporated into the U.S. ATTORNEYS’ MANUAL § 9-28.000, <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.300> (last visited May 7, 2017)).

78. *Id.*

79. *Id.*

80. *See, e.g.*, U.S. ATTORNEYS’ MANUAL, *supra* note 77, § 9-28.710.

compliance, both preventative and remedial, with a heavier emphasis on the former.

i. *The Holder Memorandum (1999)*

Eric Holder, the then Deputy Attorney General, provided “guidance as to what factors should generally inform a prosecutor in deciding whether to charge a corporation in a particular case.”<sup>81</sup> The memo lays out eight factors, the fifth of which is the “existence and adequacy of the corporation’s compliance program.”<sup>82</sup> The memo explained that the DOJ “encourages such corporate self-policing,” though the existence of a compliance program is not itself a sufficient basis for declining to charge a corporation, and the existence of such a program does not absolve the company from respondeat superior liability.<sup>83</sup> Instead, the prosecutor should evaluate the program by two criteria: (1) whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing; and (2) whether corporate management is enforcing the program effectively and in good faith or is instead merely a “paper program.”<sup>84</sup> Specifically, the prosecutor should consider, in relation to the pre-existing compliance program, the comprehensiveness of the compliance program and improvements to the program taken as remediation subsequent to discovering the violation.<sup>85</sup> Prosecutors should consider whether the compliance program is “merely a ‘paper program’ or whether it was designed and implemented in an effective manner.”<sup>86</sup> To this end, prosecutors should consider whether staffing is sufficient to “audit, document, analyze, and utilize” the compliance program and whether employees are “adequately informed about the compliance program and are convinced of the corporation’s commitment to it.”<sup>87</sup> This concern existed from the start, and it is inherent in rewarding compliance.

The memo also mentions compliance in remedial context.<sup>88</sup> Immediately following the discussion of pre-existing compliance is “[t]he corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one.”<sup>89</sup> The memo explains that the DOJ should recognize and reward corporation’s “quick recognition of the flaws in the program and its efforts to improve the program[.]”<sup>90</sup> but remedial compliance gets relatively brief attention.

---

81. Holder Memo, *supra* note 77.

82. *Id.* at Federal Prosecution of Corporations Part II.A.5.

83. *Id.* at Part VII.A.

84. *Id.* at Part VII.B.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at Part VIII.

89. *Id.* at Part II.A.6.

90. *Id.* at Part VIII.B.

ii. *The Thompson Memorandum (2003)*

Subsequently, Deputy Attorney General Larry D. Thompson provided the next installment in this series in 2003.<sup>91</sup> The Thompson Memo reiterated both “the existence and adequacy of the corporation’s compliance program” and, immediately afterwards, “the corporation’s remedial actions, including any efforts to implement an effective compliance program or to improve an existing one.”<sup>92</sup> The Thompson Memo repeats much of same language from the Holder Memo, leaving the policy substantially unchanged.<sup>93</sup> But Thompson would add significant clauses that express relying on *Caremark*.<sup>94</sup> The Thompson Memo thus explains that in evaluating compliance programs, prosecutors should consider the directors’ independent review of officers’ recommendations, the adequacy of the internal audit function, and the internal gathering and reporting of information to the board.<sup>95</sup> The principal focus thus remains on pre-existing compliance.

iii. *The McNulty Memorandum (2007)*

Deputy Attorney General Paul J. McNulty would make two important changes to enforcement policy.<sup>96</sup> In enumerating a list of factors prosecutors should consider, the McNulty Memorandum<sup>97</sup> added a ninth factor not seen in Holder and Thompson: “[T]he adequacy of the prosecution of individuals responsible for the corporation’s malfeasance.”<sup>98</sup> In so doing, the memo first announces a policy that has reached its zenith in the 2015 Yates Memo.<sup>99</sup> Secondly, the McNulty Memo introduces a term that would become essential to compliance discussions: “pre-existing.”<sup>100</sup> McNulty would take the fifth factor, “the existence and adequacy of the corporation’s compliance program,” (as in Holder and Thompson) and modify it to read, “the existence and adequacy of the corporation’s pre-existing compliance program.”<sup>101</sup> While this new adjective would not appear to alter the substance in any way—it seemed clear that the fifth

---

91. See generally Memorandum from Larry Thompson, Deputy Attorney Gen., on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), [http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20\\_privwaiv\\_dojthomp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf).

92. *Id.* at 3.

93. *Id.*

94. *Id.* at 9-10.

95. *Id.* at 10.

96. Memorandum from Paul J. McNulty, Deputy Attorney Gen., on Principles of Federal Prosecution of Business Organizations, [https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty\\_memo.pdf](https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf) (last visited May 7, 2017) [hereinafter “McNulty Memo”].

97. *Id.*

98. *Id.* at 4.

99. *Id.*

100. *Id.*

101. *Id.*

factor referred to compliance programs that existed at the time of the violation—it would provide a bit of clarification.

iv. *The Morford Memo (March 2008)*

Somewhat outside the stream of the Holder, Thompson, McNulty, and Filip Memos is the March 2008 memo of Acting Deputy Attorney General Craig S. Morford. This document had a different and specific purpose: to discuss the use of monitors in deferred prosecution and non-prosecution agreements.<sup>102</sup> The memo explained that corporate monitors are used in Deferred Prosecution Agreements and Non-Prosecution Agreements because “[t]he corporation benefits from expertise in the area of corporate compliance from an independent third party” and the corporation, as well as “its shareholders, employees and the public at large, “then benefit[s] from reduced recidivism of corporate crime and the protection of the integrity of the marketplace.”<sup>103</sup> While the details on criteria for use of monitors are not important to present purposes, the memo bears mentioning for its attention to remedial compliance.<sup>104</sup>

v. *The Filip Memo (August 2008)*

The August 2008 memo of Deputy Attorney General Mark Filip was most important for its final statement on the waiver issue, reversing the Department’s earlier policy of requiring waiver for full cooperation credit.<sup>105</sup> Perhaps secondarily, Filip would announce the formal adoption of the principles of prior memos into the United States Attorneys’ Manual, making them binding on all federal prosecutors within the DOJ.<sup>106</sup> The memo reiterates those nine factors, deleting the underlining from “pre-existing” but otherwise preserving the rest of the language concerning pre-existing compliance. So too is the sixth factor, concerning remedial compliance, left unchanged.<sup>107</sup>

vi. *The U.S. Attorneys’ Manual*

The U.S. Attorneys’ Manual thus incorporates language concerning pre-existing compliance from the Holder, Thompson, McNulty, and Filip Memos.<sup>108</sup> The enumerated factors (now up to ten) that prosecutors must consider include

---

102. Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008), <https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf>.

103. *Id.* at 1-2.

104. *Id.* at 7-8.

105. Memorandum from Mark Filip, Deputy Attorney Gen., on Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), [www.justice.gov/dag/readingroom/dag-memo-08282008.pdf](http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf).

106. *Id.* at 1.

107. *Id.* at 4.

108. U.S. ATTORNEYS’ MANUAL, *supra* note 77, § 9-28.300.

the now-familiar two provisions on pre-existing compliance and remedial compliance.<sup>109</sup> So too do the longer explanations of these respective forms of compliance, found at Sections 9-28.800 (adequacy and effective of pre-existing compliance) and 9-28.1100 (remediation), mirror the Memos' language.<sup>110</sup>

vii. *The Seaboard Report*

Though Filip would be the last chapter in this series of DOJ Memoranda,<sup>111</sup> there is perhaps one noteworthy addendum to those memos written by the U.S. Securities and Exchange Commission in 2001.<sup>112</sup> In the now well-known *Seaboard Report*, the commission settled a cease-and-desist proceeding against the former controller of a public company's subsidiary, but it declined to take action against the parent company.<sup>113</sup> The Report praises the parent company's internal investigation, voluntary disclosure, cooperation, remedial personnel decisions, and internal control reforms.<sup>114</sup> It then uses the cease-and-desist decision to announce thirteen factors that the Commission will consider in determining whether to bring charges against a company.<sup>115</sup> Generally, the *Seaboard* focus is on detection, investigation, disclosure, and cooperation.<sup>116</sup> But preventative compliance gets explicit mention.<sup>117</sup> The second of the 13 *Seaboard* factors asks, "How did the misconduct arise?" and, in elaborating on that question further asks, "What compliance procedures were in place to prevent the misconduct now uncovered?" and "Why did those procedures fail to stop or inhibit the wrongful conduct?"<sup>118</sup> While the report does not use the DOJ's language of remedial compliance, it does consider, at factor 12, "What assurances are there that the conduct is unlikely to recur? Did the company adopt and ensure enforcement of new and more effective internal controls and

---

109. *Id.* § 9-28.300(5), (7).

110. *Id.* §§ 9-28.800, .1100.

111. Many such memos were written on other topics. Most notably, the 2015 Yates Memo, while following in this line of Deputy AG-named memos announcing enforcement policy, moved beyond the attorney-client privilege issue and expounded a new DOJ focus on prosecuting individuals. Like the prior memos, it modified existing DOJ policy on other areas of enforcement—in this case, particularly that investigations should focus on individual liability from the onset, and the requirement that companies disclose all available information on individual liability to receive full cooperation credit. Unlike those memos, it did not have occasion to mention the relevance of pre-existing compliance programs. Brent Snyder, Remarks as Prepared for the Yale School of Management Global Antitrust Enforcement Conference (Feb. 19, 2016), transcript available at <https://www.justice.gov/opa/file/826721/download>.

112. See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions ("Seaboard Report"), Exchange Act Release No. 44969 (Oct. 23, 2001), <https://www.sec.gov/litigation/investreport/34-44969.htm>.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

procedures designed to prevent a recurrence of the misconduct?”<sup>119</sup> Perhaps using the parlance of securities laws, the SEC frames the remedial actions in terms of internal controls rather than compliance.

But *Seaboard* continues the pattern seen in the DOJ memos and in the previous Sentencing Guidelines. Both pre-existing and remedial compliance get mentioned,<sup>120</sup> but the heavier emphasis is on pre-existing compliance.<sup>121</sup>

#### 4. *Federal Business Law: Sarbanes-Oxley*

Enacted in 2002 after the accounting scandals at Enron, World Com, and elsewhere, Sarbanes-Oxley (“SOX”)<sup>122</sup> codified several federal requirements for public companies that enhanced U.S. compliance practices. Notably, all measures refer to pre-existing compliance rather than remedial.<sup>123</sup>

Section 302 requires that public company CEOs and CFOs make a series of certifications that will tend to induce those officers to strengthen compliance.<sup>124</sup> In the company’s quarterly and annual report, the CEO and CFO must certify that they have reviewed the reports; that those reports are not misleading; that those officers are responsible for establishing and maintaining internal controls; that those officers have evaluated the effectiveness of internal controls in the 90 days preceding the report; and that those officers have disclosed to the auditors any fraud by management or other employees with important roles in the company’s internal controls.<sup>125</sup>

Similarly, § 404 requires annual financial reports to include an Internal Control Report stating that management is responsible for the internal controls and providing an assessment of those controls’ effectiveness.<sup>126</sup> Less directly, but still relevant to compliance, § 406 requires corporations to adopt codes of ethics for senior financial officers.<sup>127</sup> Moreover, the SOX final rule commentary encourages a code of ethics (or code of conduct) for all employees that is tailored to the needs of the specific corporation.<sup>128</sup> Section 806 establishes whistleblower protections.<sup>129</sup>

119. *Id.*

120. *Id.*

121. *Id.*

122. See generally Sarbanes Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

123. 15 U.S.C. § 7241(a)(2)-(5) (2002).

124. Sarbanes Oxley Act § 302.

125. 15 U.S.C. § 7241(a)(2)-(5). See also BASRI, *supra* note 61, at 22-23.

126. Sarbanes Oxley Act § 404.

127. *Id.*

128. BASRI, *supra* note 61, at 23-24. More recently, but less directly, Dodd-Frank Wall Street Reform and Consumer Protection Act requires the SEC to pay whistleblowers who voluntarily provide information about violations of federal securities laws that leads to a successful enforcement action with sanctions more than \$1,000,000, and prohibits the employer’s retaliation against whistleblowers. Pub. L. No. 111-203, § 748, 124 Stat. 1841 (2010).

129. Sarbanes Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745 (2002).



### 5. *The DOJ's and SEC's FCPA Guidance*

A decade after SOX, the DOJ and SEC would draft their 2012 *A Resource Guide to the U.S. Foreign Corrupt Practices Act* ("Guidance").<sup>130</sup> This document is a particularly illustrative example of the DOJ's emphasis on pre-existing rather than remedial compliance, as the latter receives only brief mention while the former gets extensive treatment.

The Guidance is made necessary by a somewhat peculiar feature of FCPA enforcement: cases have historically very rarely gone to the courts, instead settling out of court through non-prosecution and deferred prosecution agreements.<sup>131</sup> As a result, we have very little case law, and the DOJ and SEC have helped to fill that void with this soft law document.<sup>132</sup> Though not formally law, it describes the enforcement agencies' views on what the FCPA means, providing informal guidance for the out-of-court enforcement process.<sup>133</sup>

In addition to describing substantive law, the Guidance describes enforcement procedures, including the factors the agencies will consider in determining whether to charge a company and how to determine the sentence.<sup>134</sup> Chapter 5, "Guiding Principles of Enforcement," begins by affirming that deciding "[w]hether and how the DOJ will commence, decline, or otherwise resolve an FCPA matter is guided by the *Principles of Federal Prosecution* in the case of individuals, and the *Principles of Federal Prosecution of Business Organizations* for companies."<sup>135</sup> The Guidance summarizes Chapter 9-28.000 of the U.S. Attorneys' Manual, which, as stated above, originated in the Holder Memo, and further references both pre-existing and remedial compliance.<sup>136</sup>

The section then contains two subsections: "Self-Reporting, Cooperation, and Remedial Efforts" and "Corporate Compliance Program."<sup>137</sup> The former summarizes past sources, particularly the Sentencing Guidelines, in a straightforward way.

But the subsection dedicated to pre-existing compliance presents a contrast in styles. It begins by citing not just the Sentencing Guidelines, as had the prior section, but also a bevy of other publications by practitioners, academics, the International Chamber of Commerce, and even Transparency International.<sup>138</sup> "In a global marketplace," it begins, "an effective compliance program ... is essential to detecting and preventing FCPA violations."<sup>139</sup> A compliance

---

130. CRIMINAL DIV. OF U.S. DEP'T OF JUSTICE & ENFORCEMENT DIV. OF U.S. SEC. & EXCH. COMM'N, *A RESOURCE GUIDE TO THE UNITED STATES FOREIGN CORRUPT PRACTICES ACT* (2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>. [hereinafter FCPA RESOURCE GUIDE].

131. *Id.* at 52-53.

132. *Id.* at 52.

133. *Id.* at 52-60.

134. *Id.* at 53.

135. *Id.* at 52.

136. See Holder Memo, *supra* note 77, at Part II.A.

137. FCPA RESOURCE GUIDE, *supra* note 130, at 54-56.

138. *Id.* at 56.

139. *Id.*

program, it explains, “promotes an ‘organizational culture that encourages ethical conduct,’” “protects a company’s reputation, ensures investor value and confidence, reduces uncertainty in business transactions, and secures a company’s assets.”<sup>140</sup> Notably, the Guidance is not just explaining pre-existing compliance, but promoting it.<sup>141</sup> The DOJ is going well beyond the Sentencing Guidelines and the U.S. Attorneys’ Manual to convince the readership to invest in pre-existing compliance.<sup>142</sup>

The subsection, of course, repeats much of the language from the Attorneys’ Manual and memos, and provides a list of attributes of an effective program.<sup>143</sup> But it then augments those sources with case studies and hypotheticals.<sup>144</sup> These were unseen in the remedial compliance subsection.<sup>145</sup> Similarly, the following subsection describes international best practices in compliance, pointing the reader to various other sources of guidance, including Department of Commerce and Department of State publications, and reports by the United Nations, OECD, World Bank, World Economic Forum, and Asia-Pacific Economic Cooperation.<sup>146</sup>

In contrast to the remedial compliance section, the pre-existing compliance section contains something of a rhetorical flourish touting the benefits of investing in pre-existing compliance.<sup>147</sup> This is much to the agencies’ credit. But it illustrates the agencies’ former emphasis on pre-existing compliance over remedial compliance, and the void that now exists in the Pilot Program.<sup>148</sup>

## 6. DOJ Settlement Documents

As part of a deferred or non-prosecution agreement, the DOJ will affix an appendix with guidance on what the defendant must do to bring its compliance program up to standard.<sup>149</sup> The appendix is plainly designed not just to advise the defendant, but to provide yet another public document detailing the DOJ’s standards for effective compliance.<sup>150</sup> To satisfy deficiencies in internal controls, compliance codes, policies and procedures regarding compliance with the FCPA and other applicable anti-corruption laws, companies agrees to conduct a review

---

140. *Id.*

141. *Id.* at 52-54.

142. *Id.* at 52-63.

143. *Id.* at 56-63.

144. *Id.* at 61, 63-65.

145. *Id.* at 54-56.

146. *Id.* at 63.

147. *Id.* at 56-60.

148. See generally FCPA Pilot Enforcement Plan, *supra* note 4.

149. See, e.g., Deferred Prosecution Agreement at C-1 to C-8, United States v. Zimmer Biomet Holdings, Inc., No. 12-CR-00080 RBW (D.D.C. 2017), <https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act> (select “Zimmer DPA” hyperlink); Deferred Prosecution Agreement at C-1 to C-7, United States v. Rolls-Royce PLC, No. 16-CR-247 (S.D. Ohio Dec. 20, 2016), <https://www.justice.gov/criminal-fraud/fcpa/cases/rolls-royce-plc> (select “DPA” hyperlink).

150. See, e.g., *Rolls-Royce*, No. 16-CR-247, at C-1 to C-7.

and, where appropriate, to adopt new or to modify existing internal controls, compliance codes, policies, and procedures.<sup>151</sup> Elements that the program should include are: “high-level commitment” (support from directors and senior management); “policies and procedures,” including policy and procedures concerning anti-bribery compliance, particularly with respect to an enumerated list of risk areas such as gifts, hospitality, travel, etc., and their promulgation and accounting procedures; “periodic risk-based review,” occurring no less than annually; “proper oversight and independence” by one or more senior corporate executives; “training and guidance,” including communications, training, and certification; “internal reporting and investigation,” such as reporting and follow-up within company; “enforcement and discipline”; “third-party relationships” (due diligence and compliance requirements); “mergers and acquisitions,” requiring due diligence, dissemination to newly acquired entities, and appropriate training and auditing; and “monitoring and testing,” taking into account new developments and international standards.<sup>152</sup> This guidance is again consistent with the practice of rewarding pre-existing compliance and, arguably, rewarding it more heavily than remedial compliance.

That practice—of rewarding both pre-existing and remedial compliance, though the former more than the latter—would gain momentum through 25 years of federal enforcement policy. But that momentum would suffer beginning in 2015, as the next section shows.

## II. AN ACCIDENTAL DRIFT: THE FCPA PILOT PROGRAM

After decades of promoting compliance in both its pre-existing and remedial forms, the last couple years have brought a new enforcement priority into relief. Though FCPA investigations traditionally focused on corporations,<sup>153</sup> the DOJ came to believe that general deterrence requires a combination of corporate and individual liability. To this end, the most recent Deputy Attorney General memo and the Pilot Program itself are focused primarily on enhancing the DOJ’s ability to prosecute individuals.<sup>154</sup>

In and of itself, this new priority has no bearing on the status of pre-existing compliance in federal enforcement policy. One might think it would leave the DOJ’s focus on both pre-existing and remedial compliance undisturbed. But it has not. In focusing on individual prosecutions, the DOJ has rightly recognized its increased reliance on voluntary disclosure and cooperation credit.<sup>155</sup> And it has rightly provided clearer and more specific incentives for voluntary disclosure and cooperation, in obvious furtherance of its goal.<sup>156</sup> But in doing so, two peculiar things have happened. First, the DOJ has also elevated the importance of remedial reliance, as the below discussion of the Pilot Program will show,

---

151. *Id.*

152. *Id.*

153. FCPA RESOURCE GUIDE, *supra* note 130.

154. *Id.* at 1-3.

155. *Id.* at 4-9.

156. *Id.*

despite the tenuous connection between remedial compliance and the Pilot Program's stated goals.<sup>157</sup> Secondly, in so doing, pre-existing compliance has dropped out of the conversation.<sup>158</sup> Neither of these developments bears an obvious policy justification; the latter is fraught with potential unintended consequences.

*A. The Yates Memo as Precursor*

In September of 2015, Deputy Attorney General Sally Yates would pen a memorandum announcing the DOJ's new enforcement focus on prosecuting individuals.<sup>159</sup> The memo makes no mention of pre-existing compliance, but, in fairness, neither does it mention remedial compliance.<sup>160</sup> And there is no reason why it should have; compliance is admittedly beyond that memo's scope. But the Yates Memo is nonetheless relevant and significant, as it shows how enforcement priorities, and therefore policy announcements, are becoming unrelated to pre-existing compliance. This change of course may help explain the inadvertent obscuring of pre-existing compliance in the Pilot Program.

The Yates Memo explains:

[O]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.<sup>161</sup>

The memo then details six steps that enforcement officials and defendants must take moving forward.<sup>162</sup> First, to qualify for any cooperation credit, corporations must provide "all relevant facts relating to the individuals responsible for the misconduct."<sup>163</sup> Second, investigations, whether criminal or civil, should "focus on individuals from the inception of the investigation."<sup>164</sup> Third, where criminal and civil government investigations are concurrent, the government attorneys working on each should regularly communicate.<sup>165</sup> Fourth, in most circumstances, the government will not release culpable individuals from civil or criminal liability when resolving a matter with the corporation.<sup>166</sup> Fifth, the corporate resolution of a case should not occur before the government has

---

157. *Id.* at 6-7.

158. *Id.*

159. *See* Yates Memo, *supra* note 29, at 1.

160. *Id.* at 1-7.

161. *Id.* at 1.

162. *Id.* at 2-3.

163. *Id.* at 2.

164. *Id.*

165. *Id.*

166. *Id.*

developed a “clear plan to resolve related individual cases” and should memorialize any applicable declinations to individuals.<sup>167</sup> Sixth, civil attorneys should consistently focus on individual liability, and should do so irrespective of the individual’s ability to pay a fine.<sup>168</sup>

This memo cannot be faulted for the compliance policy that would follow in the Pilot Program. It is relevant here only because it shows the DOJ’s new focus on individual prosecutions, and it thus might help to explain how that focus left compliance program policy in something of a blur.

### *B. The Pilot Program’s Curious Silence*

Released in April 2016, the FCPA Pilot Program Guidance<sup>169</sup> (a confusing name, given that “the Guidance” is generally how we refer to the 2012 document) first identifies the main need it seeks to fill: providing more specific and reliable cooperation credit. To do so, the program takes three factors—voluntary disclosure, cooperation, and remedial (but not pre-existing) compliance—and elevates them in importance.<sup>170</sup> It begins, “To provide incentives for organizations to self-disclose misconduct, fully cooperate with a criminal investigation, and timely and appropriately remediate, the Fraud Section has historically provided business organizations that do such things with a reduction below the low end of the Sentencing Guidelines fine range.”<sup>171</sup> However, acknowledging that incentives work only when clear and reliable, the document explains the need for instant program: “These fine reductions and other incentives have not previously been articulated in a written framework ... we intend to provide a clear and consistent understanding” of when the Fraud Section may give additional credit for voluntary disclosure, cooperation, and remediation.<sup>172</sup>

The program’s principal purpose is thus clear: the DOJ will provide clearer rewards for cooperation in order to incentivize voluntary disclosure, cooperation, and remediation. But the choice of these three factors—voluntary disclosure, cooperation, and remediation—is curious. Admittedly, the Pilot Program does not displace all the other factors that first emerged in the Holder Memo, were refined in subsequent memos, and then incorporated into the U.S. Attorneys’ Manual.<sup>173</sup> The Guidance makes clear that it “does not supplant the USAM Principles” and that “prosecutors must consider the ten factors set forth in the USAM” when resolving cases.<sup>174</sup> One of these factors, of course, is pre-existing compliance.<sup>175</sup> But the DOJ has selected three to elevate in importance, and, as

---

167. *Id.* at 2-3.

168. *Id.* at 3.

169. FCPA Pilot Enforcement Plan, *supra* note 4, at 1-2.

170. *Id.* at 2-3.

171. *Id.* at 3.

172. *Id.*

173. See McNulty Memo, *supra* note 96, at 4-5.

174. See FCPA Pilot Enforcement Plan, *supra* note 4, at 3.

175. *Id.*

the below analysis of Pilot Program settlements will show, it makes these three factors the focal points of settlement announcements. Pre-existing compliance is not among them.<sup>176</sup>

The first of the three numbered requirements is voluntary disclosure, which is now more carefully defined.<sup>177</sup> The Guidance reiterates the familiar criteria that the disclosure must occur “prior to an imminent threat of disclosure or government investigation” and that the disclosure occurs “within a reasonably prompt time after becoming aware of the offense.”<sup>178</sup> But then it adds one more requirement, announcing that a complete voluntary disclosure must entail “disclos[ing] all relevant facts known to it, including all relevant facts about the individuals involved in any FCPA violation.”<sup>179</sup> The Pilot Program is thus a natural outgrowth of the Yates Memo.

The second numbered requirement is cooperation, which now involves eight factors.<sup>180</sup> The factors generally reflect the DOJ’s new focus on individual liability and international cooperation.<sup>181</sup> Perhaps most controversially, they include the new practice of “de-confliction” of an internal investigation with the government investigation, meaning that the company has not interviewed the witnesses before the DOJ.<sup>182</sup>

The third requirement to qualify for the Pilot Program’s rewards is timely and appropriate remediation.<sup>183</sup> The Guidance explains that appropriate remediation, especially in relation to compliance, can be difficult to determine in abstract.<sup>184</sup> But it explains that the newly hired Compliance Counsel (Hui Chen) is assisting the enforcement attorneys in “refining our benchmarks for assessing compliance programs.”<sup>185</sup> Accordingly, remediation will involve the implementation of an “effective” compliance program, with the familiar and fairly general criteria (culture of compliance, sufficient resources, independence, etc.).<sup>186</sup>

Although the Guidance is widely understood to impose three requirements, there is actually a fourth.<sup>187</sup> It is not numbered, and it does not appear in same section as the numbered requirements of disclosure, cooperation, and remediation.<sup>188</sup> It actually precedes them, almost buried in the prefatory language on page two. There, the Guidance provides that “to be eligible for [the credit detailed in the memo] even a company that voluntarily self-discloses, fully cooperates, and remediates will be required to disgorge all profits resulting from

---

176. *Id.* at 2-3.

177. *Id.* at 4.

178. *Id.*

179. *Id.*

180. *Id.* at 5-7.

181. *Id.*

182. *Id.* at 5.

183. *Id.* at 7-8.

184. *Id.* at 7.

185. *Id.*

186. *Id.* at 7-8.

187. *Id.* at 2.

188. *Id.*

the FCPA violation.”<sup>189</sup> Accordingly, to be eligible for the Pilot Program’s full benefits, the defendant must satisfy not three, but four requirements: voluntary disclosure, cooperation, remediation, and disgorgement.<sup>190</sup>

If these four requirements are met, either two kinds of benefits will inure to the defendant.<sup>191</sup> The first kind of benefit, more prominent but perhaps ultimately less novel, is the quantitative penalty reductions.<sup>192</sup> If a company has cooperated and remediated per the memo’s requirements, but has not voluntarily disclosed, it will receive no more than a 25% reduction off the bottom of the Sentencing Guidelines fine range.<sup>193</sup> But if a company does this plus voluntarily discloses—that is, satisfies all three requirements provided in the Guidance—the DOJ “may” provide “up to” a 50% reduction off the bottom end of the Sentencing Guidelines range, and sanctions will generally not include a monitor.<sup>194</sup> Though again, this is subject to a fourth requirement, stated earlier in the memo, that the defendant also disgorge.

Though these quantified penalty reductions feature prominently in the Guidance memo and were the topic of much fanfare, the FCPA bar responded with something of a shrug, for a couple reasons. By most accounts these numbers represent what the DOJ was already doing; it has simply never said so explicitly and publicly.<sup>195</sup> Additionally, the DOJ protected its prosecutorial discretion by making the numbers discretionary rather than mandatory.<sup>196</sup> But the program’s second offered benefit is of greater consequence, as the subsequent settlements have illustrated.<sup>197</sup> The Guidance provides that where the above three conditions are met, and the company has disgorged, the FCPA Unit will consider a declination.<sup>198</sup> In this respect, the Pilot Program is, in effect, the DOJ’s new declination policy.<sup>199</sup> And pre-existing compliance is no part of it.<sup>200</sup>

The intended purposes of this new declination policy may be revealed in the Guidance’s next sentence, which is of unclear logical connection: “[T]his pilot program is intended to encourage companies to disclose FCPA misconduct to permit the prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered.”<sup>201</sup> Apparently, this strategy uses the prospect of a declination as an incentive to disclose evidence of individual wrongdoing, again in furtherance of the Yates Memo.

---

189. *Id.*

190. *Id.*

191. *Id.* at 8-9.

192. *Id.* at 8.

193. *Id.*

194. *Id.* at 8-9.

195. *See, e.g., Rolls Royce*, No. 16-CR-247, at C-1 to C-7.

196. *Id.*

197. *See, e.g., Letter from Daniel Kahn, Deputy Chief, U.S. Dep’t of Justice, to Luke Cadigan, Esq.* (June 3, 2016), <https://www.justice.gov/criminal-fraud/file/865406/download> [hereinafter “Letter from Kahn to Cadigan”].

198. *See FCPA Pilot Enforcement Plan, supra* note 4, at 9.

199. *Id.*

200. *Id.*

201. *Id.*

*C. The Strange Severing of Declinations from Pre-Existing Compliance*

The Pilot Program's actual effects may be clearest in application. As of press time, the DOJ had announced a total of five declinations under the Pilot Program. In June of 2016, declinations were announced for Nortek,<sup>202</sup> Akamai Technologies,<sup>203</sup> and Johnson Controls.<sup>204</sup> Then, in September of 2016, the DOJ announced the closely related declinations of HMT LLC<sup>205</sup> and NCH Corporation on the same day.<sup>206</sup>

Each of these five declinations was expressly pursuant to Pilot Program.<sup>207</sup> Each case involved evidence of the bribery of an employee, either of the defendant or a subsidiary.<sup>208</sup> But despite sufficient evidence of wrongdoing within the company, the DOJ did not hold the company liable.<sup>209</sup> Again underscoring the Pilot Program's close association with the Yates Memo, these are all cases where the DOJ seemingly wanted to go after the individuals and was willing to give the employer a pass, perhaps to enable the collection of evidence against the individual.<sup>210</sup>

These five declinations are substantially identical in the conditions that the company has satisfied and that warranted the declination. The declinations thus present a kind of formula, which has five common features.<sup>211</sup> First, each case involved a voluntary disclosure,<sup>212</sup> as defined in the Guidance. Second, each company conducted a thorough investigation.<sup>213</sup> Third, each defendant cooperated,<sup>214</sup> again as defined in the Pilot Program. The fourth factor is remediation, to include the termination of certain employees and then, of course, remedial enhancements to the compliance program.<sup>215</sup> Finally, the fifth common feature, and seemingly an element of the new declination policy, is disgorgement.<sup>216</sup>

---

202. Letter from Kahn to Cadigan, *supra* note 197.

203. Letter from Daniel Kahn, Deputy Chief, U.S. Dep't of Justice, to Ryan Rolphsen, Esq. (June 6, 2016), <https://www.justice.gov/criminal-fraud/file/865411/download> [hereinafter "Letter from Kahn to Rolphsen"].

204. Letter from Daniel Kahn, Deputy Chief, U.S. Dep't of Justice, to Jay Holtmeier, Esq. (June 21, 2016), <https://www.justice.gov/criminal-fraud/file/874566/download>.

205. Letter from Daniel Kahn, Deputy Chief, U.S. Dep't of Justice, to Steven A. Tyrrell, Esq. (Sept. 29, 2016), <https://www.justice.gov/criminal-fraud/file/899116/download>.

206. Letter from Laura N. Perkins, Assistant Chief, U.S. Dep't of Justice, to counsel for Locke Lord LLP (Sept. 29, 2016), <https://www.justice.gov/criminal-fraud/file/899121/download>.

207. *See supra* notes 197, 203-206.

208. *See supra* notes 197, 203-206.

209. *See supra* notes 197, 203-206.

210. *See supra* notes 197, 203-206.

211. *See supra* notes 197, 203-206.

212. *See supra* notes 197, 203-206.

213. *See supra* notes 197, 203-206.

214. *See supra* notes 197, 203-206.

215. *See supra* notes 197, 203-206.

216. *See supra* notes 197, 203-206.



Consider the transition from the *FCPA Guidance* to the Pilot Program. The former heralded the benefits of pre-existing compliance.<sup>217</sup> With something of a rhetorical flourish, it cited numerous white papers and international conventions, seemingly seeking to persuade the audience that pre-existing compliance is a good investment.<sup>218</sup> The *FCPA Guidance* mentioned remedial compliance, but it did so in a straight-forward and subdued way.<sup>219</sup> Remedial compliance probably gets roughly the same treatment in the Pilot Program declinations—a mention, though an unspectacular one.<sup>220</sup> The contrast between these documents lies in the emphasis on pre-existing compliance—tremendous in the *FCPA Guidance* and virtually non-existent in the recent declination announcements.<sup>221</sup>

The absence of pre-existing compliance in the Pilot Program's declinations is a problem for at least three reasons. First, rewarding pre-existing compliance is critical if the Pilot Program is to succeed by the DOJ's own criteria.<sup>222</sup> The Pilot Program's stated goals are: to "deter individuals and companies from engaging in FCPA violations in the first place"<sup>223</sup>; to "encourage companies to implement strong anti-corruption compliance programs to prevent and detect FCPA violations"<sup>224</sup>; and to "increase the Fraud Section's ability to prosecute individual wrongdoers."<sup>225</sup> Thus stated, the decision to elevate remedial compliance, and to disregard pre-existing compliance, is perplexing. Remedial compliance would not seem to further any of these goals. It does not relate to the first goal—of incentivizing companies to invest in compliance "in the first place;" companies make these enhancements in the second place, after a violation and, worse yet, an enforcement action. Nor does it relate meaningfully to the second goal of encouraging companies to implement strong programs. How many companies are thus encouraged by remedial compliance? Obviously, the defendant companies are encouraged, but they, of course, represent an extremely small sliver of the vast number of companies subject to the FCPA's broad jurisdictional provisions.<sup>226</sup> For those companies who are not (yet) defendants to an FCPA enforcement action, remedial compliance would not seem to incentivize investing in pre-existing compliance; if anything, incentivizing remedial compliance would have the reverse effect, rewarding companies for filling in the compliance gaps that they really should have filled pre-violation. And remedial compliance has no bearing on the third goal of prosecuting wrongdoers. In sum, none of the program's three goals would seem to be furthered by remedial compliance to any substantial degree.

---

217. See FCPA RESOURCE GUIDE, *supra* note 130, at 52-54.

218. *Id.* at 63.

219. *Id.* at 54-56.

220. See Letter from Kahn to Rolphsen, *supra* note 203.

221. *Id.*

222. See FCPA Pilot Enforcement Plan, *supra* note 4, at 2.

223. *Id.*

224. *Id.*

225. *Id.*

226. See FCPA RESOURCE GUIDE, *supra* note 130, at 10.

Would pre-existing compliance do better than remedial compliance in advancing the Pilot Program's stated goals? Pre-existing compliance would plainly help to prevent violations. It even more obviously encourages companies to invest in compliance. And it arguably would aid in the prosecution of individuals, to the extent that effective compliance programs would detect wrongdoing, triggering the internal investigations that uncover further evidence of the individual's violation for the company to disclose. Put another way, the Pilot Program cannot effectively achieve its stated goals without incentives for investing in pre-violation compliance. Remedial compliance does almost nothing here; pre-existing compliance would do almost everything.

The second fundamental problem with the omission of pre-existing compliance is that it runs directly contrary to currents in FCPA policy and commentary of the last several years. When the U.K. passed its Bribery Act in 2010,<sup>227</sup> that country arguably displaced the U.S. as the leader in rewarding pre-existing compliance. The statute creates a statutory defense to the charge of failure to prevent bribery where the defendant can prove it had "adequate procedures" or, in U.S. parlance, a pre-existing compliance program in place at the time of the violation. If the U.S. wishes to regain its role as a global leader in incentivizing compliance, the Pilot Program does not seem the way to do it.

The U.S. seemed to take an important step in the wake of this development when, in November 2015, the DOJ hired its first dedicated compliance expert, Hui Chen.<sup>228</sup> The Department announced that her job would be to "provide expert guidance to Fraud Section prosecutors" as they considered the enumerated factors in the United States Attorneys' Manual, "including the existence and effectiveness of any compliance program that a company had in place at the time of the conduct giving rise to the prospect of criminal charges, and whether the corporation has taken meaningful remedial action, such as the implementation of new compliance measures to detect and prevent future wrongdoing."<sup>229</sup> Her job description was thus two-fold: to assess pre-existing compliance programs and to assess remedial enhancements.<sup>230</sup>

Hui Chen's hiring seemed to announce a new era in which the DOJ would take even more seriously its long-standing commitment to evaluating and rewarding both pre-existing and remedial compliance. Indeed, her presence in the DOJ would suggest that we should be rewarding both phases of compliance more, not less. The Pilot Program does only half of that, elevating remedial compliance while neglecting pre-existing compliance. It seems incongruous.

There is a third problem with omitting pre-existing compliance from the Pilot Program. Prior to this program and its five public declinations, the poster-

---

227. See Bribery Act 2010, c. 23 (UK), [http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga\\_20100023\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf).

228. Memorandum from U.S. Dep't of Justice on the Retention of Hui Chen (Nov. 3, 2015), <https://www.justice.gov/criminal-fraud/file/790236/download> [hereinafter "Chen Retention Memo"].

229. *Id.*

230. *Id.*

child public FCPA declination was Morgan Stanley.<sup>231</sup> There, the former managing director plead guilty to foreign bribery, but the company received a declination.<sup>232</sup> In a public statement, the DOJ devoted a lengthy paragraph to praising Morgan Stanley's compliance program.<sup>233</sup> This public declination was extremely rare.<sup>234</sup> Most declinations do not involve any kind of formal statement by DOJ, being made public instead through company disclosures or other communications and then compiled privately on such sites as *The FCPA Blog*.<sup>235</sup> The Morgan Stanley declination is today a fixture of FCPA culture, cited by name with some regularity in compliance seminars and academic workshops. Indeed, one might hazard to guess that most followers of the FCPA could identify the Morgan Stanley declination by name, and very few could name another public declination.<sup>236</sup> That is, Morgan Stanley remains tremendously important and widely recognized for what it represents: the benefits of investing in pre-existing compliance.

The Pilot Program severs our declination policy from pre-existing compliance. As the above analysis shows, the DOJ has taken a dramatic turn away from the Morgan Stanley precedent, now systematically awarding declinations without mention of pre-existing compliance.<sup>237</sup> The new declinations' silence on this point raises numerous questions. First, what message does it send to companies? The DOJ now determines whether liability should attach to the employer without any public mention of the employer's pre-

---

231. Press Release, U.S. Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), <https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required>.

232. *Id.*

233. *Id.* ("According to court documents, Morgan Stanley maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign government officials. Morgan Stanley's internal policies, which were updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment. Morgan Stanley frequently trained its employees on its internal policies, the FCPA and other anti-corruption laws. Between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies 54 times. During the same period, Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times. Morgan Stanley's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments. Moreover, Morgan Stanley conducted extensive due diligence on all new business partners and imposed stringent controls on payments made to business partners.").

234. See Richard L. Cassin, *The 2016 FCPA Enforcement Index*, THE FCPA BLOG (Jan. 3, 2017, 8:08 AM), <http://www.fcpcbog.com/blog/2017/1/3/the-2016-fcpa-enforcement-index.html>.

235. *Id.*

236. The other pre-Pilot Program public declination was PetroTiger. Press Release, U.S. Dep't of Justice, Former Chief Executive Officer of Oil Services Company Pleads Guilty to Foreign Bribery Charge (June 15, 2015), <https://www.justice.gov/opa/pr/former-chief-executive-officer-oil-services-company-pleads-guilty-foreign-bribery-charge>. Admittedly, this public declination did not mention pre-existing compliance. And perhaps relatedly, very few FCPA followers can identify it by name.

237. See *supra* notes 197, 203-206.

existing compliance program. To what extent is that program even relevant to assessing corporate liability today? Of course, it remains among the ten factors in the U.S. Attorneys' Manual, and it is certainly discussed in settlement negotiations.<sup>238</sup> But in failing to mention it in enforcement policy memoranda or in the public declination letters, the incentivizing effect is plainly diminished.

Another question is perhaps more academic, but not less disconcerting. A declination is, by definition, a message that the company should not be blamed for the violation; the employee may be blameworthy, but the company is not. Simply put, how can we assess a company's liability for bribery without assessing its compliance program? The rigor and good faith of the company's pre-existing compliance program would seem to be by far the first and most important consideration in determining whether the company had taken adequate steps to prevent bribery.

But today we are told nothing—literally, nothing—in public declinations about the strength of the pre-existing compliance program.<sup>239</sup> Maybe the five companies receiving Pilot Program declinations had pre-existing compliance programs of varying quality. Maybe they all had great programs in place; maybe they were all mediocre; maybe they varied in quality, but the DOJ doesn't value that as much as it used to; maybe they had no compliance programs to speak of and so were not even mentioned. This is the problem. The public has no idea where the strength of pre-existing compliance factors into the penalty calculation. And this cannot help our shared effort to promote compliance and, in turn, deter corruption.

Indeed, if we are publicly announcing to the world that even where employees engaged in bribery, the companies will not be held liable, and there is no mention whatsoever of the company's pre-existing compliance, are we not implying that the strength of the pre-existing compliance program is actually irrelevant to corporate liability? This implication seems absurd, and surely no one at the DOJ intends to send, even tacitly, such a message. But the implied message has perhaps inadvertently been sent no fewer than five times—the quality of a company's pre-existing compliance program is not central to determining whether to issue a declination.

Pre-existing compliance thus must be re-integrated into enforcement policy generally and declination policy specifically. The next section explores ways we might do so.

### III. BRINGING COMPLIANCE BACK

From its inception in April 2015, the Pilot Program was designed to last one year, with the DOJ pledging to then “determine whether the Guidance will be extended in duration and whether it should be modified in light of the pilot experience.”<sup>240</sup> The above sections have argued that pre-existing compliance has always figured prominently in DOJ enforcement policy and that its current

---

238. See U.S. ATTORNEYS' MANUAL, *supra* note 77, § 9-28.300.

239. See, e.g., *supra* notes 197, 203-206.

240. FCPA Pilot Enforcement Plan, *supra* note 4, at 3.

displacement by remedial compliance is problematic. This section suggests several ways we might begin thinking about the reintegration of pre-existing compliance. They are not refined proposals, but rather, an effort to jump start the dialogue with enforcement officials, compliance professionals, and the FCPA bar that many FCPA followers hope the Pilot Program will generate.<sup>241</sup>

#### A. *Two Gaps in the Sentencing Scheme*

To recap, the Pilot Program's offered benefits are as follows: a 25% penalty reduction for cooperation, remediation, and disgorgement;<sup>242</sup> and either a 50% penalty reduction or a declination for voluntary disclosure, cooperation, remediation, and disgorgement.<sup>243</sup>

In exploring the potential role of pre-existing compliance in this scheme, I want to raise two questions: (1) What if the defendant met all conditions for a 50% penalty reduction *and* had a strong compliance program in place at the time of the violation?, and (2) What if a defendant met all conditions for a declination *and* had a strong compliance program in place at the time of the violation?

If we are to continue our policy of heavily promoting and incentivizing pre-existing compliance, such a defendant should be entitled to an additional benefit of some kind. It is not enough to simply say that pre-existing compliance would factor into whether a 50% reduction or a declination would issue; the point is to make the role of pre-existing compliance specific and transparent, consistent with the Pilot Program's stated objectives.

#### B. *Proposals*

This section suggests a number of ways to integrate formal, specific, and transparent rewards for pre-existing compliance into the existing pilot program framework. The first may seem counterintuitive, but it may actually make sense: a penalty reduction greater than 50% but less than 100%. This would be a middle ground between a 50% reduction and a declination. It would apply in situations where disgorgement and a penalty of some kind are warranted, and, but for the strength of the pre-existing compliance program, the defendant would get a 50% reduction. But given the existence of a quality compliance program, that penalty should be even further reduced. The Department would in effect be saying to the defendant: you're not all the way to a declination, but you're close. Although a reduction greater than 50% may seem high, it is still a penalty, obviously falling well short of a declination.

The second sentencing option would apply where the defendant has met all conditions necessary for a declination but also had a strong pre-existing compliance program in place. What reward could the DOJ offer beyond the

---

241. See, e.g., *Measured Against a "Main Goal" the DOJ Has for Its FCPA Pilot Program, the Program Is Currently Failing*, FCPA PROFESSOR (Nov. 8, 2016), <http://fcpaprofessor.com/measured-main-goal-doj-fcpa-pilot-program-program-currently-failing/>.

242. See FCPA Pilot Enforcement Plan, *supra* note 4, at 8.

243. *Id.* at 8-9.

current Pilot Program declination? The answer to that question lies in the language in which the declination is now framed. According to the Pilot Program's formal announcement, where the defendant has met all requirements, the DOJ "will consider" a declination.<sup>244</sup> The language is entirely discretionary. More to the point, the policy says nothing to suggest the degree of likelihood that a declination would issue—the DOJ may consider declinations but very rarely grant them, or it may frequently grant them, and the corporate defendant who is deciding whether to comply with the Pilot Program requirements has no way of knowing.

What if satisfying an additional requirement—a robust pre-existing compliance program—would buy the defendant a slightly greater measure of assurance that it could receive a declination? What if the DOJ signaled that if a company invests in pre-existing compliance, it is more likely to receive a declination than a company that has not? A minor change to the Pilot Program policy that would have substantial value to corporate defendants and would incentivize increased investment in compliance is a stronger presumption that the declination would issue.

Completely off the table is any mandatory language; the DOJ would likely never agree to language such as "will grant" or "shall grant" a declination, nor should it. Preserving prosecutorial discretion in this area remains critical to enforcement. But what about a presumption? Couldn't the DOJ insert language to the effect that where the defendant had met all current declination requirements, and additionally had a robust compliance program in place at the time of the violation, the defendant is "more likely" to receive a declination?

Accordingly, the policy could state that where the defendant had voluntarily disclosed, conducted a full investigation (a requirement not stated in the Pilot Program Guidance, but a common feature of all declinations issued under the program), cooperated, remediated, and disgorged, the DOJ "will consider" a declination. But where the defendant had met all these requirements AND had a robust compliance program in place at the time of the violation, the defendant is "likely," or at least, "more likely," to receive a declination. Perhaps satisfying all these requirements could create a rebuttable presumption—rebutted, of course, in the discretion of the DOJ—that a declination would issue. Alternatively, the policy could state that where these requirements are met, a declination will likely issue "absent extraordinary circumstances," again to be determined at the discretion of the prosecutor. There are a number of possible formulations, each of which would signal to the corporate sector that investments in pre-existing compliance will be rewarded. It would assure companies that incentivizing those investments has always been a feature of FCPA enforcement policy, and it remains so today.

Another option is to return to the traditional meaning of declination: a declination without disgorgement. This is the kind of declination that Morgan Stanley famously received, even though its employee had plainly engaged

---

244. *Id.* at 9.

committed a violation.<sup>245</sup> That might seem, at first glance, a sensible option for a company that has met all the Pilot Program conditions for declination with disgorgement, but who also has a strong pre-existing compliance program. After all, it was the policy in place when those two rare public declinations—Morgan Stanley and PetroTiger, discussed above—were announced.

Indeed, one credible alternative declination policy that has been on the table for some time would do that very thing.<sup>246</sup> Billy Jacobson, former second-in-command at the DOJ's Fraud Unit and now a partner at Orrick, Herrington & Sutcliffe, first floated this proposal in an April 2012 issue of *Bloomberg's Criminal Law Reporter*.<sup>247</sup> Jacobson proposed that the Fraud Unit exercise its prosecutorial prosecution and adopt a policy of not bringing FCPA-related criminal charges if the company can demonstrate that it satisfied five criteria.<sup>248</sup> Those criteria are: (1) voluntary disclosure of the violation; (2) no participation in the illegal conduct by senior management; (3) full cooperation with the government, including providing evidence and other information against employees, directors, and agents of the company; (4) remedial measures to prevent future violations, including disciplining culpable employees and adopting improved internal controls and anti-corruption training; and (5) having adopted a strong compliance program before the illegal conduct occurred.<sup>249</sup> Note that this proposal is essentially consistent with the Pilot Program declinations, with two exceptions.<sup>250</sup> First, it adds the requirement of a strong pre-existing compliance program;<sup>251</sup> second, it makes no mention of disgorgement.<sup>252</sup>

Critics may respond that Jacobson's proposal looks like a U.K.-style good faith compliance defense, which the U.S. Chamber of Commerce famously pushed for and the DOJ just as famously rejected.<sup>253</sup> But the Jacobson proposal is really something like a compliance/disclosure/cooperation defense, and it is thus much more demanding than anything that the Chamber of Commerce proposed or that now exists in the U.K. Bribery Act.<sup>254</sup> And if we are already willing to grant declinations without much regard for the condition of the pre-existing compliance program, one might argue that a company that had additionally established a strong pre-existing program is entitled to the added benefit of a traditional, Morgan Stanley-type of declination.

---

245. See Press Release, U.S. Dep't of Justice, *supra* note 231.

246. *Id.*

247. See *id.*

248. *Id.* at 1.

249. *Id.* at 2.

250. *Id.*

251. *Id.*

252. *Id.*

253. See, e.g., Matthew Stephenson, *Why Do People Care So Much About the Proposed FCPA Compliance Defense?*, GLOBAL ANTICORRUPTION BLOG (Mar. 24, 2015), <https://globalanticorruptionblog.com/2015/03/24/why-do-people-care-so-much-about-the-proposed-fcpa-compliance-defense/>.

254. See Bribery Act 2010, c. 23, § 7 (UK), [http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga\\_20100023\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf).

However, it may simply make sense that a corporate defendant should not be permitted to keep the spoils of an illegal act. Indeed, this author has heard corporations—even former FCPA defendants—endorse this very principle, even though it appears contrary to the corporate sector’s interests. To the extent that most FCPA stakeholders now believe that the defendant, even if innocent, should not keep the ill-gotten gains, the Morgan Stanley type of declination—a declination without disgorgement—may have become an historical artifact.

Accordingly, there may now exist something of a “new normal”—a consensus among FCPA stakeholders on the content and consequences of a declination. One component of that consensus is that corporate defendants should disgorge. But another component may well be that a company that has invested in a strong pre-existing compliance program is entitled to a greater reward than a company that has not. Indeed, it is almost impossible to imagine anyone believing otherwise.

The present task for FCPA stakeholders is to figure out how best to do so. This article has shown that both the possibility and the need exist. There exists room within the current Pilot Program to provide additional benefits to companies that had taken the efforts to create industry-standard compliance programs before they were investigated by the government. And the article has likewise demonstrated the need: if the program is to succeed by its own stated goals, we simply must explicitly recognize pre-existing compliance in announcing, via a declination, that the company should not bear liability for its employee’s wrongdoing. It is hard to imagine a principle of enforcement policy any less objectionable.

#### CONCLUSION: PROMOTING COMPLIANCE IN A NEW ADMINISTRATION

In exploring how to credibly factor pre-existing compliance into our declination policy, some may charge that companies will be able to adopt “paper” compliance programs and thus get themselves off the hook unjustly.<sup>255</sup> Although this risk certainly exists, it is inherent in the very practice of incentivizing pre-existing compliance. Any effort to evaluate an existing compliance program will require assessing whether the program was truly implemented in good faith.<sup>256</sup> This risk was originally recognized in the Holder Memo,<sup>257</sup> and it has guided DOJ enforcement policy since. To argue for the impossibility of distinguishing between paper and good faith compliance programs is to argue that pre-existing compliance should never factor into charging or sentencing decisions. And that is a place virtually no one wants to go.

Some may argue instead that the rigor that is necessary to separate the paper from the good faith programs is simply too resource-intensive given the DOJ’s

---

255. See, e.g., Tom Fox, *What Is a Paper Compliance Program?*, COMPLIANCE WEEK (Dec. 29, 2016), <https://www.complianceweek.com/blogs/the-man-from-fcpa/what-is-a-paper-compliance-program#.WKHN3WW8v0g>.

256. See generally Holder Memo, *supra* note 77.

257. *Id.*



current capacities. This may well be true. But the DOJ has said that it hired Hui Chen to address this very problem;<sup>258</sup> everyone involved seemed to hope that she would do that very thing. If she cannot for lack of resources, she may need some hired help. But to now abandon the commitment to evaluating pre-existing compliance programs would be a major setback, one no one is prepared to accept.

Ultimately, the radical position is not that we should incorporate pre-existing compliance into the center of enforcement policy; rather, the radical position is that we should not, or that we need not even talk of doing so. Without attributing poor judgment or animus to the DOJ, we must now recognize that the current drift of pre-existing compliance is deeply dangerous to the goal of incentivizing compliance investments and in turn deterring international bribery.

A new presidential administration and political climate may require a new approach to promoting anti-bribery reforms. The values of deregulation, decreasing federal spending, maximizing business competitiveness, and a relative disinterest in international cooperation have gained ascendancy. But rewarding pre-existing compliance is a policy goal that does not divide FCPA shareholders. Just as the government has for 25 years asked corporations to bear these preventative costs, and civil society members seek greater corporate accountability, the corporate sector has clamored for increased guidance on what constitutes good compliance and how much they may be rewarded for it. This pressure resulted in the DOJ hiring Hui Chen, as well as the Pilot Program's newly explicit policies. It is just good policy, and the DOJ has always recognized as much. The present omission is likely nothing more than an accident of the policy-making process. Let's just own it and fix it.

---

258. Chen Retention Memo, *supra* note 228.